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No. 90-970

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In The
Supreme Court of the United States
October Term, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD and THOMAS L. JOHNSON,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Montana

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a state venue statute violates the equal protection clause of the Fourteenth Amendment because it requires that residents, including domestic corporations, be sued in their county of residence, while nonresidents, including foreign corporations, may be sued in any county.

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OCTOBER TERM, 1991

No. 91-779

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD and THOMAS L. JOHNSON,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF FOR RESPONDENTS

STATEMENT

Petitioner, the Burlington Northern Railroad ("BN"), challenges Montana's residence-based venue statute on the ground that it denies equal protection to foreign corporations. The trial courts in both of these consolidated cases rejected the claim and, on interlocutory appeal, the Montana Supreme Court affirmed.

1. *The Montana Venue Statute.*—The statute at issue in this case provides that "the proper place of trial for all civil actions is the county in which the defendants or any of them may reside . . . [and] if none of the defendants reside in the state, the proper place of trial is in any county the plaintiff designates . . . ." Mont. Code

Ann. ("MCA") §§ 25-2-118(1), (2) (1991). This provision traces its origins to Montana's days as a territory. *See* Acts, Resolutions and Memorials of the Territory of Montana, Title II § 20 (1864) (reprinted in the statutory appendix to petitioner's brief). The current version was enacted in 1985 as part of a comprehensive recodification of the venue laws, which had been recommended by the Montana Supreme Court's Commission on the Rules of Evidence. *See* MCA § 25-2-101 *et seq.* (1991) (including commentary by Supreme Court Commission).[1]

Montana law further provides that domestic corporations qualify as residents for purposes of applying this venue statute. Such a corporation is deemed to reside in "the county in which it has its principal place of business." *Platt v. Sears, Roebuck & Co.*, 721 P.2d 336, 338 (Mont. 1986). This principal place of business, in turn, is "easily identifiable" (*Mapston v. Joint School Dist. No. 8*, 740 P.2d 676, 677 (Mont. 1987)), because each corporation must file an annual report with the Secretary of State indicating where its executive officers are located. *See* MCA § 35-1-1101 (1991), *amended by* § 35-1-1104 (effective Jan. 1, 1992).

Foreign corporations doing business in Montana are considered to be nonresidents within the terms of the venue statute. When the question first arose in 1926, the Montana Supreme Court ruled that "unless [a foreign corporation] is given a domestic residence by some statutory provision, it remains a nonresident of the state and comes within the provision that such person may be sued in any county of the state." *Pue v. Northern Pac. Ry.*, 252 P. 313, 315 (Mont. 1926) (citations omitted). Since then,

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[1] The Commission recommended and the legislature adopted the continuation and modification of several additional venue provisions for specific kinds of actions—*e.g.*, a plaintiff may file a tort suit in "the county where the tort was committed" (MCA § 25-2-122(2) (1991)), regardless of where the defendant resides. *See generally* MCA §§ 25-2-121 through 25-2-126 (1991).

the court has reaffirmed this principle on numerous occasions. *See, e.g., Foley v. General Motors Corp.*, 499 P.2d 774 (Mont. 1972). The Montana Supreme Court Commission that proposed the current venue statute likewise relied on this principle, emphasizing that "by definition, a nonresident of the state is not resident in *any* county." MCA § 25-2-118 commentary (Annotations 1990).[2]

2. *The Present Case.*—This case began as two separate actions under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* Both were filed in state district court in Billings, which is in Yellowstone County, Montana. Each plaintiff is a BN employee who lives, works, and was injured in Sheridan, Wyoming, a small town located about 100 miles from Billings.[3] BN is incorporated in Delaware and has its principal place of business in Fort Worth, Texas. Pet. App. 4a. In Montana, BN has extensive trackage and substantial numbers of personnel in various counties, including Yellowstone. J.A. 20-21.[4] BN nevertheless challenged venue in Billings, insisting that it could only be sued in Hill County, where its Montana Division—one of several BN Divisions operating in the State—is headquartered. The sole basis for BN's motion was that, under this Court's decision in

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[2] In *McAlear v. Kasak*, 731 P.2d 908 (Mont. 1987), the Montana Supreme Court held that, in a tort action, a defendant—either resident or nonresident—could be sued only in the county where the tort had been committed. That decision was quickly overruled in *Haug v. Burlington N. R.R.*, 770 P.2d 517 (Mont. 1989), which again made clear that "if none of the defendants reside in Montana, a plaintiff may choose any county in the state as the place of trial of a tort action." *Id.* at 520.

[3] Sheridan has a population of about 14,000. Billings, the nearest "big" city, has a metropolitan area of approximately 115,000 people. Both respondents received medical treatment in Billings for the injuries that led to this litigation.

[4] BN also maintains a registered agent to receive service of process in Helena, the State capital, which is located in Lewis & Clark County, Montana.

Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927), Montana's distinction with respect to venue for domestic and foreign corporations violates the equal protection clause. Both trial judges rejected this claim.

The Montana Supreme Court consolidated the cases on appeal and affirmed, concluding that its "decision appears to be controlled by a series of U.S. Supreme Court decisions, beginning with *Cincinnati Street Ry. Co. v. Snell* (1904), 193 U.S. 30." Pet. App. 6a. In particular, relying on the analysis in the most recent of these cases, *American Motorists Inc. v. Starnes*, 425 U.S. 637 (1976), the Montana court held that "the statute which is challenged by defendant is nondiscriminatory in its operation." Pet. App. 15a. The court stressed that the present case differs from *Saunders*, because there the "defendant did no business in the county where venue was established. In this case, [BN] admittedly does business in Yellowstone County." *Id.* 9a.[5] This distinction was especially important, the court explained, because the claims at issue here were based on FELA—a statute that provides extremely broad venue in the federal courts, reflecting a national "policy of allowing railroad workers to sue their employer at any location where the employer does business." *Id.* 11a. Consequently, "[t]he practical effect of [Montana's] venue statute in this case is that defendant is required to defend itself in Yellowstone County, Montana—a location where it could admittedly be required to appear and defend itself against the same claim, had plaintiffs chosen to sue it in federal district court." *Id.* 15a. In these circumstances, the court ruled, the specific discrimination alleged by BN was too insubstantial to merit constitutional protection.

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[5] The Montana court also observed that "subsequent decisions by the U.S. Supreme Court raise a question about whether *Saunders* continues to be good law." Pet. App. 11a; *see also id.* 12a-14a (discussing post-*Saunders* cases).

SUMMARY OF ARGUMENT

The residence-based distinction that Montana's venue statute draws between domestic and foreign corporations does not violate the equal protection clause. The legal standard for making that determination is whether "the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983). In this case, the disputed classification reasonably serves the legitimate "convenience" concerns of corporate residents by insisting that they be sued where they are headquartered—the place where their responsible executive officials, corporate records, and legal counsel are normally located. By contrast, foreign corporations, precisely because they have their principal place of business outside the state, do not usually present the kind of convenience-based justifications that support residential venue. As a result, such corporations frequently are amenable to suit in a different array of locations. *See, e.g., Brunette Machine Works Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972) (federal venue statute requires that domestic corporations be sued where they reside whereas foreign corporations may be sued in any federal court nationwide).

Petitioner does not challenge Montana's general distinction between domestic and foreign corporations but, rather, argues only that *some* foreign corporations are constitutionally entitled to be treated as if they were residents of the State. That position, however, rests on a fundamental misunderstanding of the nature of rational basis scrutiny under the equal protection clause. The legislature simply need not tailor statutory classifications with mathematical precision, eliminating every possible instance of under- or over-inclusion. *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). On the contrary, inherent in the nature of the legislative function is the recognition that "[g]eneral rules are essen-

tial . . . even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano v. Jobst*, 434 U.S. 47, 53 (1977). Nothing in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), on which petitioner places primary reliance, detracts from this basic point. The venue provision in that case was not limited to a single residence, but allowed domestic corporations to be sued in any county where they had an office. Given *that* starting point, it is not nearly so easy to identify a rational basis for permitting a foreign corporation to be sued statewide, rather than in the counties where *it* had offices. Nor is the constitutionality of Montana's venue statute undermined by petitioner's complaints about "forum shopping"—an attack that, in this case, turns out to be as factually insupportable as it is legally irrelevant.

ARGUMENT

THE MONTANA VENUE STATUTE DISTINGUISHING BETWEEN DOMESTIC AND FOREIGN CORPORATIONS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The distinction that Montana draws with respect to venue for resident and nonresident defendants does not violate the equal protection clause because it is rationally related to a legitimate state interest. That state interest is to promote the convenience of residents by allowing them to be sued where they live, where their books and records are generally kept, and where their attorneys are likely to be found. The statutory classification drawn to further this legitimate state interest is reasonably tailored. Residents as a group, including domestic corporations, are likely to be convenienced in fact by a venue rule allowing them to be sued where they are located. Nonresidents, including foreign corporations, on the other hand, normally will not derive similar benefits from being sued at a particular location in the state. The equal protection clause allows Montana to employ these reasonable categorical distinctions and does not require it to redraft

its venue statute so that each foreign corporation would be allowed to show, on a case-by-case basis, that it has obtained a *de facto* residence within the State.

1. A venue provision like the one at issue in this case must be "tested under the lenient standard of rationality that this Court has traditionally applied in considering equal protection challenges to regulation of economic and commercial matters." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983) (citing cases).[6] Under that standard, "a statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Ibid.*; *see also Pennell v. City of San Jose*, 108 S. Ct. 849, 859 (1988) (the Court "'will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational'") (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (brackets in original).

The application of these general principles requires the Court to answer only "two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981) (citing cases).

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[6] There is no question that the rational basis prong of equal protection analysis applies to this case. *See, e.g.*, Pet. Br. 7 ("the Montana venue system . . . bears no rational basis related to a legitimate state purpose"). Indeed, this Court has held that this standard applies to substantially more burdensome forms of discrimination against foreign corporations. *See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981) (rational basis test applies when state imposes "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations").

In this case, each of those questions warrants an affirmative response.[7]

a. Petitioner does not dispute, nor could it, that Montana's residence-based venue provision serves a "legitimate state purpose." Virtually every State and the federal government has always had venue statutes designed to distribute litigation based on considerations "relat[ing] to the convenience of litigants." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). *See generally* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3803 (1986). Although different states use one or more of several customary criteria, "[t]he most common provision today, and the basic one, appears to be venue based upon the residence of the defendant." Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 Mich. L. Rev. 307, 315 (1951); *see also id.* at 315 n.33 (citing Appendix referencing statutes in 47 states that employed this criterion). Similarly, the cornerstone of federal venue statutes for more than a

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[7] To satisfy the rational basis test, a state need not set forth its rationale in legislative history or through judicial opinion. *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (when "there are plausible reasons for [the legislature's] actions, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether the reasoning in fact underlay the legislative decision' ") (internal citation omitted); *McGinnis v. Royster*, 410 U.S. 263, 277 (1973) ("we . . . refuse to discard a clear and legitimate purpose because the court below perceived another to be primary"); *Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481, 2489-90 (1988) ("we are not bound by explanations of the statute's rationality that may be offered by the litigants or other courts"). Accordingly, petitioner's reliance on the alleged absence of any clear expression of the State's rationale for its venue statute (Br. 23-27) is beside the point. It also happens to be incorrect: the legislative history of the current version of the statute, including the Supreme Court Commission's report setting forth the basis for the distinction, provides a contemporaneous statement of legislative purpose. *See* MCA § 25-2-118 commentary (Annotations 1990). *See also infra* note 19 (discussing the Montana Supreme Court's specific case-related considerations for rejecting petitioner's claim).

century has been the defendant's residence. *See, e.g., Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972). The justification for this particular venue rule is self-evident: it tends to minimize the cost and inconvenience of litigation to the party that is being sued.

b. The distinction that Montana draws between domestic and foreign corporations is rationally related to the legitimate state interest promoted by a residence-based venue statute. As a general matter, it seems hard to dispute that a corporate defendant is likely to be convenienced by being sued, as in Montana, where it has its principal place of business: that is where the officials who have the ultimate responsibility and authority for directing the corporation's defense are located; it is where the corporation's records, including relevant insurance policies and other important documents, are usually kept; and it is where the corporation's chief legal counsel is likely to reside.

On the other hand, these kinds of convenience considerations are usually inapplicable to foreign corporations. Thus, many such corporations, even when subject to suit in a state, are not present there (*see, e.g., Quill Corp. v. North Dakota*, No. 91-194 (U.S. Sup. Ct., pending)) or, if they are present, it is only through the use of transient personnel. And even for a corporation like petitioner, which maintains offices in the State but has its principal place of business elsewhere, the factors that justify residential venue are unlikely to be present. As Justice Holmes long ago explained, "[a] foreign corporation merely doing business in the State and having its works elsewhere is more or less inconvenienced by being sued anywhere away from its headquarters." *Saunders*, 274 U.S. at 498 (dissenting opinion).[8]

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[8] Moreover, to the extent that a foreign corporation is actually inconvenienced in a given case, Montana allows it to seek a transfer of venue under the doctrine of *forum non conveniens*. MCA § 25-

The rationality of Montana's venue statute is supported not only by reasoned analysis but also by history and current practice. Thus, federal law establishes exactly the same distinction—providing venue for U.S. citizens (including corporations) in a "judicial district where any defendant resides, if all defendants reside in the same State," 28 U.S.C. §§ 1391(a), (b), whereas "*an alien may be sued in any district*," *id.* § 1391(d) (emphasis added). This distinction, as this Court observed, traces "its roots . . . back to the beginning of the Republic." *Brunette Machine Works*, 406 U.S. at 708. It applies to foreign corporations as well as individuals and rests on the view that "the general venue provisions were framed with reference to the defendant's place of residence or citizenship, and an alien defendant is by definition a citizen of no district." *Id.* at 709 (footnote omitted) (relying on *In re Hohorst*, 150 U.S. 653 (1893)).[9] By the same token, while petitioner now at-

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2-201(3) (1991) (transfer "when the convenience of witnesses and the ends of justice would be promoted"). While petitioner correctly notes that the Montana Supreme Court has ruled that such transfers are unavailable in FELA cases (*see Haug v. Burlington N. R.R.*, 770 P.2d 517, 521-22 (Mont. 1989)), that fact has no bearing here. As petitioner repeatedly emphasizes, its challenge is to the Montana venue statute as it applies to foreign corporations in all cases and not to its particular application in FELA actions. *See, e.g.*, Br. 28 ("FELA is not the subject of this case"). Indeed, petitioner has never suggested that the *forum non conveniens* doctrine would support a transfer to Hill County, which is the only venue petitioner has sought here. In any event, the Montana Supreme Court's special rule in FELA cases—applicable to domestic and foreign railroads alike—legitimately reinforces Congress's "policy favoring the injured railroad worker's choice of forum." *Labella v. Burlington N., Inc.*, 595 P.2d 1184, 1187 (Mont. 1979). That court has also repeatedly indicated that "if a substantial increase of this type of litigation is called to our attention in the future we will reexamine the situation." *Ibid.* As we discuss below, no such increase in FELA cases has been experienced in Montana. *See infra* note 18.

[9] Aliens are, however, "persons" protected by the equal protection component of the Fifth Amendment's due process clause. *See, e.g.*,

tempts to suggest otherwise (Br. 15-16), in its petition BN correctly recognized that a "number of states" have venue provisions like Montana's. Pet. 23; *see id.* at 22-23 & nn. 32-35 (citing cases).

In summary, it is simply not plausible to argue that Montana's distinction between venue for domestic and foreign corporations lacks a rational basis. In our view, Justice Holmes was plainly correct when he stated that the convenience factors affecting venue determinations indicate that "the difference to [a foreign corporation] between one county and another is likely to be less than it will be to a corporation having its headquarters in the State." *Saunders*, 274 U.S. at 681 (dissenting opinion). But even if this Court were to have any doubt about that conclusion, there would still be no basis for holding that Montana is being "arbitrary" or "irrational" in following it. *See, e.g., Western & Southern Life Ins. Co.*, 451 U.S. at 674 ("[p]arties challenging legislation under the Equal Protection Clause cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable' ") (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (brackets in original). Petitioner's claim must therefore be rejected.

2. Petitioner does not acknowledge, much less dispute, these fundamental principles of equal protection analysis or their application to Montana's venue statute. Instead, it attempts to sidestep their force, arguing not that the general distinction between domestic and foreign corporations is impermissible, but only that *some* foreign corporations are entitled to be treated as residents for venue purposes. In support of this conclusion, petitioner relies almost exclusively on a single precedent, *Power Mfg. Co.*

United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1064 (1990) (citing cases). Consequently, petitioner's challenge here would appear to implicate the validity of the federal venue statute as well.

v. Saunders, 274 U.S. 490, which it attempts to bolster with a generalized claim that "forum shopping" has become a serious problem under Montana's venue provision. This argument is both flawed in concept and lacking in support.

a. Apparently recognizing that Montana's venue distinction between domestic and foreign corporations is obviously legitimate in many circumstances, petitioner inconspicuously attempts to carve out a more limited position—one that premises the statute's invalidity on a comparison between a domestic corporation and "an out-of-state corporate defendant *with a fixed place of business and a registered agent* [in Montana]." Br. 7, 9 (emphasis added). The short answer to this claim, however, is that the rational basis test does not require the states to craft their statutes with the degree of exactness that petitioner is demanding. On the contrary, a "statutory classification . . . need not be drawn so as to fit with precision the legitimate purpose animating it. That [a State] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) (citations omitted). Indeed, as this Court has recognized, "[g]eneral rules are essential [if particular areas are] to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

The application of these settled principles in the present case demonstrates just how far petitioner has wandered from the rational basis standard on which it purports to rely. As a preliminary matter, petitioner makes no effort to tie its attack on Montana's venue statute to the legitimate convenience concerns that the statute is properly designed to serve. Thus, neither in general nor with respect to this case in particular does petitioner claim that

the presence of "a fixed place of business and a registered agent [in Montana]" (Br. 7, 9), would make litigation against a foreign corporation more convenient in any single county. In fact, such a claim seems untenable on its face: in many instances, including this case, a foreign corporation's registered agent (often a law firm) will not even be in the same county as that of its fixed place of business; and to complicate matters further, such a corporation will often have fixed places of business in several counties throughout the State. There is no reason to think that any of these several locations would be a uniquely convenient place for a foreign corporation to defend a lawsuit. In short, by uncoupling the legislative classification from its intended purpose, petitioner is essentially making a meaningless comparison for equal protection purposes.

More fundamentally, even if petitioner could show that considerations of convenience would support treating certain corporations as *de facto* residents, its argument would still be unavailing. Montana has drawn a statutory classification that, among other things, has the virtue of being readily administrable. Thus, to our knowledge, in the State's entire history there has never been a case raising a question about the appropriate residential venue for a domestic corporation. As the Montana Supreme Court has observed, a domestic corporation's residence is "easily identifiable." *Mapston v. Joint School Dist. No. 8*, 740 P.2d 676, 677 (Mont. 1987). The adoption of petitioner's approach, by contrast, would inevitably lead to case-by-case factual disputes over the quintessentially artificial question of where a foreign corporation that has its real principal place of business *outside Montana* may properly be said to have its principal place of business within the State.[10] Take, for example, a foreign corporation that

[10] It seems obvious that a foreign corporation cannot simply be allowed to make its own choice of an in-state "principal place of business." As one court has aptly observed, such a corporation "may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since

owns three drug stores in different counties in Montana: there is no principled way to establish that corporation's single "residence" for venue purposes. In a similar vein, the location of petitioner's "residence" in Montana will also be a sharply contested issue because BN does business and maintains offices throughout the State.[11] Given these realities, Montana has a strong interest in avoiding the depletion of its limited judicial resources by having to resolve such collateral, front-end factual disputes about venue. To respect just that kind of interest—*i.e.*, to prevent the inevitable imprecision of legislative classifications from being routinely displaced by the rigors of the judicial factfinding process—the rational basis test is expressly designed to tolerate a considerable amount of statutory under-inclusion, over-inclusion, or both. That permissible amount has not been exceeded here.

b. Petitioner's heavy reliance on this Court's decision in *Power Mfg. Co. v. Saunders* is likewise misplaced, both

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its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical. Competitive factors probably would dictate that its principal office be located where it intends to conduct its business." *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801, 808 (Tex. Ct. App. 1963).

[11] BN claims that its principal place of business in Montana is in Havre, Hill County, because that is where the headquarters for its Montana Division is located. But, as discovery in this case already shows, BN also has trackage from its Dakota and Denver Divisions in Montana and has offices and substantial personnel in Yellowstone County, where the present cases were filed. In fact, all of the BN Divisions operating in Montana intersect in only one county (Yellowstone), which is where Montana's largest city (Billings) is located. Moreover, while BN has more total employees in Havre than in Billings, the claim agents and legal counsel who handle BN's tort actions are located primarily in Billings. *See generally* Deposition of Mark Bruce (BN's Rule 30(b)(6) witness), *Ford and Johnson v. Burlington N. R.R.*, Nos. DV-89-974, -89-975 (Dec. 19, 1989). These facts demonstrate that identifying a single Montana residence for BN would be essentially arbitrary and might even lead to different conclusions by different Montana courts.

because *Saunders* is readily distinguishable and because it is probably no longer good law even on its own terms. In *Saunders*, this Court struck down an Arkansas statute providing that a suit against a domestic corporation could be brought in "a[ny] county where it has a place of business or in which its chief officer resides," whereas a suit against a foreign corporation could be brought "in any county in the state." 274 U.S. at 491, 492. From the point of view of equal protection analysis, that statute differs significantly from the one at issue here. In particular, given the venue applicable to domestic corporations in *Saunders*—*anywhere* they have an office—there was no apparent reason for applying a different rule to foreign corporations that had offices within the State, especially because it is equally easy to identify the places where foreign and domestic corporations actually have an office. In contrast to the statute in *Saunders*, however, the Montana statute premises venue on a *single* residence. *See* MCA § 1-1-215(2) (1991) (individual or corporation can "only [have] one residence"). And based on *that* legitimate state choice, the distinction that Montana draws between domestic and foreign corporations is, as we have already shown, entirely reasonable.

Petitioner's reliance on *Saunders* is also misplaced because the case lacks any contemporary vitality. Thus, as noted earlier, Justice Holmes (joined by Justice Brandeis) dissented in *Saunders*, explaining that "[a] statute has to be drawn with reference to what is usual and probable. A foreign corporation merely doing business in the State and having its works elsewhere will be more or less inconvenienced by being sued anywhere away from its headquarters, but the difference to it between one county and another is likely to be less than it will be to a corporation having its headquarters in the State." 274 U.S. at 498. Shortly after *Saunders*, this extremely lenient view of equal protection analysis in venue cases was effectively adopted in an opinion written by Justice Holmes for a unanimous Court. *Bain Peanut Co. v. Pinson*, 282

U.S. 499 (1931). That case involved a Texas venue statute providing broader venue for corporations than for individuals. Echoing his views in *Saunders*, Justice Holmes wrote that "[i]n deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than are fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but *whether the difference does injustice to the class generally, even though it bear hard in some particular case.*" *Id.* at 501 (emphasis added). *See also Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935) (statute prohibiting foreign but not domestic corporations from imposing contractual limitation on time for bringing suit does not violate equal protection).

More recently, the Court in *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976), upheld a Texas venue statute allowing for transfers in a way that provided domestic corporations with "some measure of discovery" regarding the merits of the case—an opportunity that was not available to foreign corporations. *Id.* at 644. Even though the Court determined that it had no need to pass on the current force of *Saunders* (*see infra* note 19), it nevertheless went out of its way to note that "more recent decisions raise the question whether *Saunders* continues to be good law." *Id.* at 646 n.6 (citing cases). Moreover, Chief Justice Burger, joined by then-Justice Rehnquist, concurred in *Starnes*, resting squarely on the analysis in Justice Holmes's *dissent* in *Saunders* and his *majority* opinion in *Bain Peanut*. Thus, while *Saunders* has not been expressly overruled, the case has been confined to its specific facts.

Indeed, even BN appears to have taken this view of *Saunders* and its progeny as recently as four years ago, when it urged the Montana Supreme Court to reject a venue challenge based on a distinction between in-state and out-of-state plaintiffs. *See* Appellant's Br. in *Haug*

v. Burlington N. R.R., supra.[12] In that case, relying on the *Starnes* Court's quotation of the opinion in *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, 36-37 (1904), BN flatly asserted that "[d]ifferent venue treatment does not result in denial of equal protection and is not otherwise unconstitutional." Appellant's Br. in *Haug* at 5.[13] There is no reasoned basis for BN to have reversed course here. And if *Saunders* is a dead letter, it follows automatically that BN's claim in this case is meritless.

The other cases that BN relies on are equally unhelpful to its cause. In the first place, several of those cases *upheld* classifications that directly discriminate against foreign corporations, thus tending to support respondent's position, not petitioner's. *See, e.g., Western & Southern Life Ins. Co.*, 451 U.S. at 662-68 (upholding retaliatory state tax imposed only on foreign corporations); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (upholding statute that tolled statute of limitation for foreign corporations that did not register). Second, the equal protection cases striking down differential treatment for foreign corporations involved discriminatory taxes that

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[12] The specific discrimination alleged in *Haug* was between out-of-state plaintiffs who could bring tort suits in any county in Montana and in-state plaintiffs who could only sue in the county where the tort was committed. Appellant's Br. in *Haug* at 5.

[13] BN quoted the following language from *Starnes* quoting *Snell* (425 U.S. at 644-45, quoting 193 U.S. at 36-37):

> [I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

were "designed only to favor domestic industry within the State, no matter what the cost to foreign corporations seeking to do business there." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *see also ibid.* (citing the same cases as petitioner cites at Br. 20-21). The 128-year-old venue statute at issue in this case, by contrast, unquestionably was not "designed" to create—nor is there any reason to think it has the effect of creating—the kind of economic protectionism that is implicated by naked tax discrimination.[14] Finally, petitioner's citation to the line of equal protection cases involving discrimination against newly arrived residents (Br. at 21 n.24) is likewise inapposite—if for no other reason than that those cases generally relied on the effect of the challenged statute on the right to travel, a factor that is not present here. *See, e.g., Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 901-04 (1986) (plurality opinion) (discussing line of cases cited by petitioner).[15]

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[14] Notably, petitioner has not raised a Commerce Clause claim, which would, of course, require a showing of such protectionism. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789, 800-02 (1992).

[15] Petitioner also attempts to buttress its claim by making two arguments that could be read to suggest that some kind of heightened equal protection scrutiny might be appropriate here. First, petitioner asserts that the tax discrimination cases it cites "have arisen in contexts where there is arguably more room for line-drawing than in judicial processes." Br. 21. But, as applied to a venue statute like that at issue here, petitioner's hierarchy of classificatory imprecision is exactly backwards. *See, e.g., Starnes*, 425 U.S. at 644 (" 'it is fundamental rights which the 14th Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights' ") (quoting *Cincinnati Street Ry. v. Snell*, 193 U.S. at 36).

Similarly, petitioner's assertion that a "non-resident is a prime example of someone whose interests should not be entrusted solely to the political processes," (Br. 21), is quite remarkable in the present context. Petitioner, after all, has premised its entire argument on the claim that it is, in substance, a *resident* of Montana. In any event, the notion that a powerful corporation like BN, which does substantial business and employs numerous people in Montana, is

c. Lacking any legal support for its position, petitioner resorts to the customary policy arguments about the evils of forum shopping, and then claims that the Montana venue statute exacerbates these general problems. Br. 32-34, 37-39; *see also* Amicus Br. of the Association of American Railroads 8-16; Amicus Br. of Washington Legal Foundation 6-16. While long on rhetoric, this argument is short on substance. As a legal matter, the forum shopping that petitioner complains about is simply not relevant to its equal protection claim; and as a factual matter, the suggestion that the Montana venue statute is leading to abusive practices against petitioner has no support.

Forum shopping has been a well-accepted part of our judicial system since its inception. *See, e.g., Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1282 (1990) (plaintiff "has the option of shopping for a forum with the most favorable law"); *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964) (same). Indeed, while defendants generally have less opportunity to forum shop, they often file transfer or removal motions when such efforts offer the prospect of a tactical or legal advantage. The wisdom of allowing such practices by either party is, of course, subject to legitimate debate. But, as a constitutional matter, the issue is not whether more or fewer opportunities for forum shopping is a good thing; it is, rather, whether the rule that expands or limits such opportunities is based on a rational justification. And as we have already shown, the Montana statute adequately rests on just such a justification.

In any event, petitioner's own data refute the argument that BN is "being subjected to a virulent form of forum shopping [in Montana]." Pet. 17. According to petitioner (*see* Pet. 16), BN has had 195 FELA cases filed against it in Montana in the past six years. Of

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somehow disadvantaged in its ability to participate in the State's democratic processes cannot be taken seriously.

those, 55 were filed in the county where the tort was committed and, therefore, have no relevance to BN's residence-based claim (*id.* 19 n.21)[16]—except to emphasize that in at least a quarter of the cases the substantial advantages that supposedly accrue to a plaintiff by being able to select any court in the State had *no* magnetic force. Of the remaining 140 FELA cases against BN, 121 of them were filed in only two of Montana's 56 counties—Yellowstone and Cascade. *See* Pet. App. 40a-44a.[17] Those counties contain Montana's two main metropolitan areas—Billings in Yellowstone and Great Falls in Cascade—which have populations of approximately 115,000 and 75,000 respectively. It should be expected, therefore, that a substantial portion of state litigation—involving either domestic or foreign corporations—will be conducted in those cities because that is where the major law firms are located and where many of the large domestic corporations have their principal place of business. Petitioner cannot fairly claim these major cities—where *its* FELA defense lawyers and expert medical witnesses are generally located—are inconvenient or otherwise inappropriate places in which to litigate.[18]

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[16] Under Montana law, domestic corporations are similarly amenable to suit in the county where the tort is committed. MCA § 25-2-122(2) (1991).

[17] The remaining 19 FELA cases against BN were filed in 5 other counties.

[18] Petitioner further charges that Montana is becoming a magnet for FELA cases from "across the entire upper northwest region of the United States." Br. 38. This argument is likewise irrelevant and unsupported. In the first place, those cases, much like the in-state cases, have been filed almost exclusively in Great Falls and Billings (44 of 49 in the past six years). And most of the cases come from nearby towns in Wyoming, which are much less likely to have lawyers who are experienced in FELA cases or specialized medical personnel who are needed to evaluate and treat the complicated injuries that frequently lead to such lawsuits. Second, States are of course free to adopt this kind of "open forum" policy, *see, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), and the Montana Supreme Court has repeatedly indicated that if there

In sum, petitioner's data demonstrate that BN's protestations about open-ended exposure to litigation in 56 separate counties and abusive forum-shopping practices are empty. To the contrary, petitioner's smoke screen regarding forum shopping by plaintiffs merely distracts attention from BN's attempt to do some forum shopping of its own here. Havre, where BN claims it must be sued, is a small town near the Canadian border, inaccessible by air and thus almost certain to be inconvenient for plaintiffs and their lawyers and witnesses. Havre also happens to be a town where BN is the dominant employer and, therefore, where it may well expect more hospitable juries. A desire to secure those kinds of strategic advantages, while understandable, simply cannot properly be dressed in constitutional clothes. Petitioner's claim should be rejected.[19]

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is a substantial increase in out-of-state FELA litigation, it will reconsider its rule against using the *forum non conveniens* doctrine to return FELA cases to their home States. *See, e.g., Labella*, 595 P.2d at 1187. BN attempted to make such a showing recently, but it was only able to point to *seven* out-of-state FELA cases that were pending in the Montana courts in 1986. The Montana Supreme Court held that seven cases in a State "where there are over 16,000 civil cases filed statewide per year is not a significant number of cases as to require the exercise of our power of supervisory control." *State ex rel. Burlington N. R.R. v. District Court of the Eighth Judicial Dist.*, 746 P.2d 1077, 1080 (Mont. 1987). In the five years since then, it appears that an additional 42 out-of-state FELA cases have been filed against BN in Montana. Pet. App. 40a-41a. An average of eight such cases per year hardly indicates that Montana is a "haven" for this kind of litigation. By way of comparison, the Amicus Brief of the Association of American Railroads points out that between 1988 and 1990 an average of 215 out-of-state FELA cases per year were filed in West Virginia; and that BN alone had 102 such out-of-state cases pending against it in state court in St. Louis on September 15, 1991, even though Missouri's venue statute treats domestic and foreign corporations identically. Amicus Br. 12-14.

[19] Although we have addressed petitioner's argument on its own terms—*i.e.*, by showing that the Montana venue statute rationally furthers a legitimate state interest—the Montana Supreme Court,

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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as we noted at the outset, rejected the claim on a narrower ground. In particular, the court followed the approach in *American Motorists Ins. Co. v. Starnes*, where this Court concluded that it need not determine whether there was a reasonable basis for a Texas venue statute that treated foreign and domestic corporations differently, because the distinction, in practice, conferred no "appreciable advantage" on domestic corporations. *Id.* at 644. In the present case, the court below, relying primarily on the strongly pro-plaintiff venue provision of FELA, similarly found that Montana's venue statute was "nondiscriminatory in operation." Pet. App. 15a. The court's reasoning is set forth fully in its opinion and summarized above. *See supra* p. 4. It is also supported at length by the *amici curiae* briefs filed in support of respondents. *See* Amici Curiae Br. of the States of Montana, *et al.*; Amicus Curiae Br. of the Montana Trial Lawyers Ass'n. In our view, based on *Starnes*, this alternative analysis also provides an independent ground on which to affirm the judgment below.